



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF TRIPON v. ROMANIA (No. 2)

(Application no. 4828/04)

JUDGMENT

STRASBOURG

23 September 2008

FINAL

23/12/2008

This judgment may be subject to editorial revision.

In the case of Tripon v. Romania (no. 2),

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Josep Casadevall, *President*,

Elisabet Fura-Sandström,

Corneliu Bîrsan,

Alvina Gyulumyan,

Egbert Myjer,

Ineta Ziemele,

Ann Power, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 2 September 2008,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 4828/04) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a German national, Mr Vasile Tripon (“the applicant”), on 5 December 2003.

2. The applicant was represented by Mr Nicolae Ionescu, a lawyer practising in Bucharest. The Romanian Government (“the Government”) were represented by their Agent, Mr Răzvan-Horațiu Radu, from the Ministry of Foreign Affairs.

3. The German Government, to whom a copy of the application was transmitted under Rule 44 § 1 (a) of the Rules of Court, did not exercise their right to intervene in the proceedings.

4. The applicant alleged that the quashing of a final and enforceable decision favourable to him by means of an extraordinary appeal had violated his right to a fair hearing and his property right.

5. On 9 October 2006 the Court decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1945 and lives in Haiger, Germany.

7. On 12 November 1996, the applicant bought 7,000 shares having the value of 3,500,000,000 Old Romanian Lei (ROL), in a Romanian company, L. (“the company”). On 24 January 1997 and 21 September 1998 these shares, representing 87.5% of the total value of the company’s nominal capital, were recorded in the trade register (*Registrul Comerțului*).

8. On 26 September 1999 the other shareholders decided, in the applicant’s absence, to increase the company’s capital by assets contributed by one of the shareholders, thus devaluating the applicant’s share in the company from 87.5 % to 10.29% of its capital. On 4 October 1999 mention of this modification was made in the trade register.

9. On 4 November 1999 the applicant lodged an action with the Bucharest County Court, seeking the annulment of the 26 September 1999 decision.

10. The action was allowed on 22 October 2001. The County Court considered that the decision under review had not observed the requirements of Law no. 31/1990 on companies (“Law no. 31”). It therefore cancelled it.

The solution was upheld by the Bucharest Court of Appeal on 25 February 2000 and also by the Supreme Court of Justice, in a final decision of 27 June 2001, upon appeals by the company.

11. On 6 November 2000 the applicant lodged a request with the Trade Register Office for the 4 October 1999 entry to be removed from the trade register. On 18 January 2001 the request was allowed, on the ground that the shareholders’ decision of 26 September 1999 had been annulled by the courts. Upon an appeal by the company, that solution was upheld by the Bucharest County Court in a final decision of 8 March 2001.

On an unspecified date, the Procurator General lodged an extraordinary appeal with the Supreme Court of Justice, with a view to having the final decision of 27 June 2001 quashed (*recurs în anulare*), on the grounds that the ordinary courts had been wrong in considering that the shareholders’ decision had not complied with the legal requirements and that, in any case, the applicant had lacked standing to bring his initial action.

12. The Supreme Court considered that the evidence in the case confirmed that the 26 September 1999 decision had observed Law no. 31. Therefore, in a final decision of 9 June 2003, it allowed the extraordinary appeal and, on the merits of the case, rejected the applicant’s initial action.

II. RELEVANT DOMESTIC LAW

13. The relevant articles of the Code of Civil Procedure read as follows:

Article 330

“The Procurator General may, of his own motion or on an application by the Minister of Justice, apply to the Supreme Court of Justice for a final decision to be quashed on any of the following grounds: ...

2. when the decision in question has seriously infringed the law by giving a wrong solution on the merits of the case, or when the decision is manifestly ill-founded; ...”

Article 330¹

“The time-limit for lodging an appeal on the grounds provided for by Article 330 § 2 is one year from the date on which the decision became final.”

14. These provisions have been repealed by Article I § 17 of the Government’s Emergency Ordinance no. 58 of 25 June 2003.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

15. 1. The applicant complained that his right to a fair hearing had been breached in so far as the final decision of 27 June 2001 of the Supreme Court of Justice had been quashed and reversed by means of an extraordinary appeal (*recurs în anulare*). He relied on Article 6 § 1 of the Convention, which reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

A. Admissibility

16. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties’ submissions*

17. The Government contended that several aspects distinguished this case from *Brumărescu v. Romania* ([GC], no. 28342/95, ECHR 1999-VII) and *SC Maşinexportimport Industrial Group SA v. Romania* (no. 22687/03, 1 December 2005) where the Court found that the same extraordinary appeal had violated the applicant’s right to a fair hearing.

18. Accordingly, in the case at hand the Procurator General had not acted on his own initiative but at the request of one of the parties to the

proceedings. Furthermore, this case concerned a private dispute, both parties to the procedure having equal rights to ask the Procurator General to institute the review.

They also considered that the final decision had been quashed because it had seriously infringed the law and in order to correct judicial mistakes and miscarriages of justice.

19. Lastly, they informed the Court that this extraordinary procedure had been repealed from the Civil Code.

20. The applicant contested the Government's position and pointed out that a State authority had intervened in a private-law dispute.

2. *The Court's assessment*

21. The Court reiterates that, under its settled case-law, the right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question (*Brumărescu*, cited above, § 61).

22. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case, as it has considered that the extraordinary appeal under review has infringed the principle of legal certainty in so far as it was not open to the parties to the procedure but to the Procurator General alone and as by allowing the application the Supreme Court of Justice set at naught an entire judicial process which had ended in a judicial decision that was *res judicata* and which had, moreover, been executed (see, among many others, *Brumărescu*, § 62; *SC Maşinexportimport Industrial Group SA*, § 36, judgments cited above and *Cornif v. Romania*, no. 42872/02, §§ 29-30, 11 January 2007).

23. Lastly, the Court reiterates that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character (see *Ryabykh v. Russia*, no. 52854/99, § 52, ECHR 2003-IX).

24. In the present case the Court notes that, after being determined by the courts that dealt with the merits of the case in the ordinary proceedings, the relevant law and the applicant's right to lodge the initial action were reassessed by the Supreme Court of Justice, which expressed a different

view than that of the previous courts and allowed the extraordinary appeal on this point.

Despite the Government's claim to the contrary, the Court considers that this situation is nothing but a mere reinterpretation of the facts and applicable law, which, bearing in mind the circumstances of the case, does not justify the quashing of a final and binding decision.

25. Furthermore, the Court considers the Procurator General's intervention in a private dispute to be an aggravating factor. Moreover, it does not share the Government's view that no issue arose in the matter as both parties could request the Procurator General's intervention. Although this State official acted upon the company's request, the fact remains that the exercise of the extraordinary appeal was solely at his discretion (see also *Brumărescu*, § 20, and *Ryabykh*, § 56, judgments cited above).

26. The foregoing considerations are sufficient to enable the Court to conclude that the quashing of the final decision of 27 June 2001 infringed the applicant's right to a fair hearing.

There has accordingly been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

27. The applicant also considered that the quashing by means of an extraordinary appeal of the final decision whereby he had been implicitly recognised as the owner of 87.5 % of the company's nominal capital, violated his right to peaceful enjoyment of his possessions, as guaranteed by Article 1 of Protocol No. 1 which reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

28. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

29. The Government contended that no interference with the applicant's possession occurred, in so far as even after the change in the company's capital composition the applicant had remained the owner of 7,000 shares worth ROL 3,500,000,000.

Should the Court consider that there was an interference with the applicant's right, the Government argued that it had been provided by law and had pursued a legitimate aim, to which it had been proportionate.

30. The applicant contested the Government's argument and contended that he had lost his possession because of the quashing of the final decision favourable to him.

2. *The Court's assessment*

31. The Court notes that the final decision of 27 June 2001 recognised implicitly that the applicant's shares were worth 87.5% of the company's value. Therefore, as a consequence of the extraordinary appeal, the applicant's share in the company was reduced to 10.29% of the company's capital, which affected his shareholder power, in particular his ability to influence the company and control its assets (see, *mutatis mutandis*, *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 92, ECHR 2002-VII).

32. In the light of the above, the Court considers that quashing this decision after it has become final and irrevocable will constitute an interference with the applicant's right to the peaceful enjoyment of his possession (see *Brumărescu*, cited above, § 74). Even assuming that such an interference may be regarded as serving a public interest, the Court finds that it was not justified since a fair balance was not preserved and the applicant was required to bear an individual and excessive burden (*ibid.*, §§ 75-80).

33. It follows that there has been a violation of Article 1 of Protocol No. 1 to the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

35. The applicant claimed the following amounts in respect of pecuniary damage:

- 487,500 euros (EUR) for the value of his shares, and
- EUR 500,000 for loss of profit.

He asked the Court to establish the amount to be awarded to him in respect of non-pecuniary damage.

36. The Government reiterated that even after the quashing of the final decision the applicant remained the owner of his 7,000 shares, no causal link having been established between any pecuniary damage he might have incurred and the violation alleged. They also asked the Court to make no award in respect of non-pecuniary damage, as the applicant had failed to make a valid request under that head.

37. The Court notes that, although having been informed, on 26 February 2007, about the Court's requirements concerning the just satisfaction claims, the applicant did not send the required supporting documents. The Court thus considers that the claims in respect of pecuniary damage are unsubstantiated and rejects them. On the other hand, it awards the applicant EUR 2,000 in respect of non-pecuniary damage (see, *mutatis mutandis*, *Arsenovici v. Romania*, no. 77210/01, § 55, 7 February 2008).

B. Costs and expenses

38. The applicant also claimed EUR 10,000 for costs and expenses without specifying or itemising the claim.

39. The Government asked the Court not to grant any sum under this head.

40. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court rejects as unsubstantiated the claim for costs and expenses.

C. Default interest

41. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the respondent State's national currency at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 23 September 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President